

IN THE NAME OF THE RUSSIAN FEDERATION

CONSTITUTIONAL COURT
OF THE RUSSIAN FEDERATION

Judgment
of 27 February 2009 No. 4-II

in the case concerning the review of the constitutionality of certain provisions of Articles 37, 52, 135, 222, 284, 286 and 379¹ of the Civil Procedure Code of the Russian Federation and Section 4, Article 28 of the Law of the Russian Federation “On Psychiatric Care and Guarantees of Citizens’ Rights in its Course” in connection with complaints of Yu. K. Gudkova, P. V. Shtukaturov, and M. A. Yashina.

Saint Petersburg, 27 February 2009

The Constitutional Court of the Russian Federation composed of President V. D. Zorkin and Judges N. S. Bondar, G. A. Gadzhiev, Yu. M. Danilov, L. M. Zharkova, S. M. Kazantsev, M. I. Kleandrov, S. D. Knyazev, L. O. Krasavchikova, S. P. Mavrin, N. V. Melnikov, Yu. D. Rudkin, S. V. Seleznev, A. Ya. Sliva, V. G. Strekozov, O. S. Khokhkryakova, V. G. Yaroslavtsev,

in the attendance of the attorney V. L. Grozovsky as Yu. K. Gudkova’s representative, attorney D. G. Bartenev as P. V. Shtukaturov’s representative, attorney Y. L. Ershov as M. A. Yashina’s representative, Permanent Representative of the State Duma to the Constitutional Court of the Russian Federation A. N. Kharitonov, Plenipotentiary Representative of the Council of the Federation to the Constitutional Court of the Russian Federation A. I. Aleksandrov, Plenipotentiary Representative of the President of the Russian Federation to the Constitutional Court of the Russian Federation M. V. Krotov,

pursuant to Section 4, Article 125 of the Constitution of the Russian Federation, Subsection 3, Section 1, Sections 3 and 4, Article 3, Section 1, Article 21, Articles 36, 74, 86, 96, 97 and 99 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation”,

in an open hearing, examined the constitutionality of certain provisions of Articles 37, 52, 135, 222, 284, 286 and 379¹ of the Civil Procedure Code of the Russian Federation and Section 4, Article 28 of the Law of the Russian Federation “On Psychiatric Care and Guarantees of Citizens’ Rights in its Course”.

The reasons for the consideration of the case is complaints of Yu. K. Gudkova, P. V. Shtukaturov and M. A. Yashina. The ground for the consideration of the case is the discovered uncertainty of whether the provisions challenged by the applicants are in conformity with the Constitution of the Russian Federation.

Insofar as all the complaints concern the same subject matter and pursuant to Article 48 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation”, the Constitutional Court of the Russian Federation is permitted to consider these applications together.

Having heard the report of Judge-Rapporteur V. G. Strekozov, statements by the parties' representatives, an intervention by T. A. Vasilyeva for the Prosecutor General of the Russian Federation, and having considered written submissions and other materials, the Constitutional Court of the Russian Federation

e s t a b l i s h e d :

1. The applicants in the present case, Yu. K. Gudkova, P. V. Shtukaturov and M. A. Yashina, challenge the constitutionality of Section 1, Article 284 of the Civil Procedure Code of the Russian Federation, which stipulates that a request for incapacitation shall be considered by the court with the participation of the person concerned, the applicant, the prosecutor, a representative of the guardianship office, and that the person whose legal capacity is being examined by the court should be summoned to the court hearing if the person's state of health permits his attendance.

P. V. Shtukaturov and M. A. Yashina also request review of the constitutionality of Section 5, Article 37 of the Civil Procedure Code of the Russian Federation, under which the rights, freedoms and lawful interests of persons declared incapable shall be defended in proceedings by their legal representatives – guardians or other persons given this right by the federal law. Besides, P. V. Shtukaturov challenges the constitutionality of a similar norm of Section 5, Article 52 of the Civil Procedure Code of the Russian Federation, and Subsection 3, Section 1, Article 135 of the same Code, under which the judge shall return a civil claim submitted by an incapable person, Paragraph 3, Article 380, under which a supervisory complaint or a prosecutor's request is to be returned by the judge without examination on the merits if the complaint or the prosecutor's request were submitted by a person not having the right to appeal to a supervisory review court (Federal Law No. 330-Φ3 of 4 December 2007 annulled Article 380, but the norm of its Paragraph 3 is reproduced in Subsection 2, Section 1, Article 379¹ of the said Code). The applicant also challenges the provisions of Section 4, Article 28 of Law of the Russian Federation No. 3185-I of 2 July 1992, “On Psychiatric Care and

Guarantees of Citizens' Rights in its Course", under which a person declared incapable within a procedure prescribed by law shall be placed in an in-patient psychiatric facility at the request or with the consent of his legal representative.

P. V. Shtukurov also challenges Paragraph 3, Article 222 of the Civil Procedure Code of the Russian Federation, under which the court shall not consider a civil claim submitted by an incapable person, and Section 2, Article 286 of the said Code, under which, in cases foreseen by Subsection 3, Article 20 of the Civil Code of the Russian Federation, at the request of the guardian, a member of the family, a psychiatric or psycho-neurological clinic, a guardianship office, and based on a conclusion of a forensic psychiatric expert examination, the court decides to declare the person capable and on the basis of this decision the guardianship of the person is terminated. However, the application of these provisions in the applicant's case is not proven by the submitted materials. Therefore, to this extent the proceedings are to be discontinued.

1.1. Yu. K. Gudkova, P. V. Shtukurov and M. A. Yashina, at the request of their close relatives, were declared incapable by the judgments of the Primorsky District Court of Saint Petersburg of 29 September 2005, the Vasileostrovsky District Court of Saint Petersburg of 28 December 2004 and the Zheleznodorozhny Town Court of the Moscow Region of 15 November 2004, respectively. These persons were not notified of the time and place of the hearings in their cases, because under the forensic psychiatric expert examinations evaluating their mental state it was concluded that the nature of the disorder will not allow them to understand the meaning of their actions and control them, and that they could not attend the court hearing.

The cassation appeals against these court judgments and the requests to restore the time limits for lodging an appeal, which were submitted by Yu. K. Gudkova and the representative of P. V. Shtukurov of his own choosing, were returned with reference to the absence of a possibility for persons declared incapable to protect their rights in court themselves (letter of a judge of the Primorsky District Court of Saint Petersburg, decision of the Vasileostrovsky District Court of Saint Petersburg of 22 December 2005). P. V. Shtukurov's supervisory review complaint was returned without consideration on the same ground. The supervisory instance courts, including the Supreme Court of the Russian Federation, refused to grant *certiorari* in M. A. Yashina's case and to transfer it to a supervisory review court for consideration on the merits.

The European Court of Human Rights examined P. V. Shtukurov's complaint and in its judgment of 27 March 2008 in the case *Shtukurov v. Russia* found violations of the applicant's rights to liberty and security of person, to a fair trial, and to respect for private and family life set

out in the Convention for the Protection of Human Rights and Fundamental Freedoms (Articles 5, 6 and 8).

1.2. The complaints to the Constitutional Court of the Russian Federation signed by Yu. K. Gudkova, P. V. Shtukaturov and M. A. Yashina and submitted by the representatives of their own choosing allege that the challenged provisions permit court consideration of an incapacitation request without the participation of the person concerned do not provide to the person declared incapable a possibility of addressing the court independently, i.e. on his own behalf and irrespective of the guardian's opinion, to defend his rights and lawful interests, including the restoration of the legal capacity, and do not require a court to decide on the issue of involuntary hospitalization of the incapable person. These provisions violate their rights guaranteed by Articles 19, 22, 23, 24, 45, 46 and 123 of the Constitution of the Russian Federation.

In considering the admissibility of the applicants' complaints provided that they were declared incapable by court judgments in force and that the complaints were submitted to the Constitutional Court of the Russian Federation not by their legal representatives (guardians), but by persons whom they themselves chose as their representatives, the Constitutional Court of the Russian Federation reached the following conclusions.

The Federal Constitutional Law "On the Constitutional Court of the Russian Federation", defining the competence of the Constitutional Court of the Russian Federation to examine citizens' complaints against violation of their constitutional rights and freedoms by a law which was applied or is to be applied in a specific case, does not provide for any special requirements to standing of the applicant as regards legal capacity. Under general rules of procedure of the Constitutional Court of the Russian Federation, set out in Articles 52 and 53 of the said Federal Constitutional Law, participants in proceedings are parties to the case, including the applicants (persons who submitted an application to the Constitutional Court of the Russian Federation) and the parties' representatives who may be attorneys or persons having an academic degree in law and whose powers are proven by appropriate documents.

Under Article 3 of the said Federal Constitutional Law, the Constitutional Court of the Russian Federation decides only on issue of law (Section 3), and in constitutional proceedings shall refrain from ascertaining and examining factual circumstances in all cases where it is within the competence of other courts or bodies (Section 4). In this case the applicants seek review by the Constitutional Court of the Russian Federation of the constitutionality of the provisions which served as a basis for the first instance courts to declare them legally incapable and under which (with the consent of their guardians) they were involuntarily placed in

psychiatric in-patient facilities, while their appointed guardians were persons at whose requests the said judgments were rendered.

Within the meaning of Article 125 of the Constitution of the Russian Federation in conjunction with its Articles 118, 120 and 126 and Article 74 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation”, a court's decision to declare a person incapable is to be reviewed if it was delivered on the basis of a law the provisions of which violate the person's constitutional rights *inter alia* in the way these provisions are interpreted in the current judicial practice.

Therefore, pursuant to Article 46 (Sections 1 and 2) and Article 125 (Section 4) of the Constitution of the Russian Federation taken in conjunction with Articles 52, 53, 96 and 97 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation”, a person has the right to lodge a complaint with the Constitutional Court of the Russian Federation against a violation of his constitutional rights by the provisions which served as a basis for a first instance court to declare him incapable, and thus *de facto* restricted his right guaranteed by Article 60 of the Constitution of the Russian Federation.

It would otherwise be impossible to review whether the constitutional rights were violated by the procedure prescribed by law for declaring a person incapable and therefore would not be consistent with the guarantees for protecting constitutional rights and freedoms in constitutional judicial proceedings, established by Articles 19 (Section 1), 46, 55 (Section 3), 60, 118 (Section 2) and 125 (Section 4) of the Constitution of the Russian Federation, while constitutional judicial proceedings are the exclusive prerogative of the Constitutional Court of the Russian Federation. Since this review may not be exercised either by any other domestic judicial body or by any intergovernmental body, including the European Court of Human Rights, the Constitutional Court of the Russian Federation recognizes admissible the complaints of the applicants submitted by the representatives of their choosing.

1.3. Consequently, pursuant to Articles 74, 96 and 97 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation”, the subject matter for consideration by the Constitutional Court of the Russian Federation in the present case is the following provisions:

- the provision of Section 1, Article 284 of the Civil Procedure Code of the Russian Federation establishing that the person whose legal capacity is being examined by the court shall be summoned to the court hearing if his state of health permits his attendance;

- interrelated provisions of Section 5, Article 37, Section 1, Article 52, Subsection 3, Section 1, Article 135, and Subsection 2, Section 1, Article 379¹ (Paragraph 3, Article 380 as in force before the entry into force of Federal Law No. 330-Φ3 of 4 December 2007) of the Civil

Procedure Code of the Russian Federation, which regulate the possibility for a person declared incapable to lodge cassation appeals or supervisory review complaints against the respective decision of a court;

– the provision of Subsection 4, Article 28 of the Law of the Russian Federation “On Psychiatric Care and Guarantees of Citizens’ Rights in its Course” establishing a possibility of involuntary hospitalization of an incapable person with the consent of his guardian without a court decision.

2. The Constitution of the Russian Federation declares a man, his rights and freedoms the supreme value and, since the rights and freedoms are directly applicable, determine the meaning, contents and application of laws and are ensured by administration of justice it is a duty of the state to recognize, observe and protect those rights and freedoms and to protect human dignity (Articles 2 and 18; Section 1, Article 21).

The inalienability of fundamental rights and freedoms and the fact that they belong to everyone from birth (Section 2, Article 17 of the Constitution of the Russian Federation) implies the need for adequate guarantees, *inter alia* guarantees for persons suffering from mental disorders. These guarantees include, first and foremost, the right of everyone to judicial protection, which is universal and serves as a procedural guarantee for all other constitutional rights and freedoms, as well as everyone's right to qualified legal assistance (Article 46 and Section 1, Article 48 of the Constitution of the Russian Federation), which under Article 56 (Section 3) of the Constitution of the Russian Federation may not be restricted.

2.1. Pursuant to the Constitution of the Russian Federation, a citizen of the Russian Federation may independently exercise his rights and duties in full from the age of 18 (Article 60); citizens declared by court to be legally incapable shall not have the right to elect and be elected (Section 3, Article 32). The Constitution of the Russian Federation does not expressly provide for any other limitations for incapable persons.

Within the meaning of the mentioned provisions of the Constitution of the Russian Federation taken in conjunction with its Articles 46 and 55 (Section 3), a person may be declared incapable under a federal law within a proper judicial procedure. And as follows from Article 22 of the Constitution of the Russian Federation protecting everyone’s right to liberty and security of person, a person suffering from a mental disorder may be deprived of liberty for the purpose of involuntary treatment only by a court decision made within a procedure prescribed by law. It implies that judicial protection for this person should be fair, full and effective, including his right to qualified legal assistance and the right to have the assistance of a defence counsel of his own choosing (Article 48 of the Constitution of the Russian Federation). Any limitations within the incapacitation proceedings shall be reasonable and proportionate.

These provisions of the Constitution of the Russian Federation correspond with the provisions of the instruments of international organizations, which, on the basis of the universal principles of the rule of law, humanism, fairness and equality, establish the principles generally recognized in modern democratic states in procedures for declaring a person incapable and involuntarily placing him in a psychiatric hospital.

The Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care (adopted on 17 December 1991 by Resolution 46/119 of the UN General Assembly) expressly state that any discrimination is impermissible, i.e. distinction, exclusion or preference related to a person's mental illness that have the effect of nullifying or impairing equal enjoyment of all the internationally recognized civil, political, economic, social and cultural rights (Paragraphs 4 and 5, Principle 1), and provide for the right of a person whose legal capacity is at issue in judicial proceedings to be represented by a counsel, and the right to appeal to a higher court against any incapacitation decision, equally with his personal representative, if any, and any other interested person (Paragraph 6, Principle 1).

Recommendation 818 (1977) of the Parliamentary Assembly of the Council of Europe, "On the Situation of the Mentally Ill", of 8 October 1977, Recommendations of the Committee of Ministers of the Council of Europe including Recommendation R (83) 2, "Concerning the Legal Protection of Persons Suffering from Mental Disorder Placed as Involuntary Patients" of 22 February 1983, Recommendation R (99) 4, "On Principles Concerning the Legal Protection of Incapable Adults" of 23 February 1999, Recommendation R (2004) 10 "Concerning the Protection of Human Rights and Dignity of Persons with Mental Illness" of 24 February 2004 also state that persons with a mental illness shall have the possibility to exercise all civil and political rights, and limitations on these rights shall only be allowed strictly in accordance with the Convention for the Protection of Human Rights and Fundamental Freedoms and shall not be based on the mere fact that a person has a mental illness. The Member States of the Council of Europe are recommended to ensure that a court decision is not taken on the basis of a medical report alone and that a mental patient, like any other person, is given the right to be heard and that in cases when an offence is alleged, a counsel is present throughout the proceedings.

Recommendation R (99) 4 of the Committee of Ministers of the Council of Europe also articulated governing and procedural principles of legal protection for incapable adults, which Member States of the Council of Europe are recommended to be guided by in the respective legislative regulation. Thus, the governing principles include the principle of flexibility in legal response, proposing, *inter alia*, the use of such legal arrangements that would ensure full regard to the degree of incapacity of the person concerned in a specific legal situation for the protection of his personal and economic interests; the principle of maximum preservation of capacity,

meaning, among other things, recognition, so far as possible, that different degrees of incapacity may exist and that incapacity may vary from time to time; the principle of proportionality of a measure of protection to the degree of capacity of the person concerned, based on taking into account the specific circumstances and needs of the person and allowing intervention with his rights and freedoms to the minimum extent necessary for achieving the purpose of the intervention. The procedural principles of the Recommendation include the principle of observance of the right of the person concerned to be heard in person in any proceedings which could affect his legal capacity, as well as the principle of reasonable duration of measures of protection and the possibility for periodical reviews and appeal.

2.2. Under Articles 5 and 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, in their interpretation by the European Court of Human Rights, everyone's right to liberty and security of person implies that mentally ill persons may not be deprived of liberty and put in detention in a manner other than within a procedure prescribed by law; such persons shall be guaranteed the right to a fair trial, including the right to consideration of their case within a reasonable time by an independent and impartial tribunal established by law, and the right to defend themselves in person or through legal assistance of their own choosing.

The Constitutional Court of the Russian Federation previously expressed its legal opinion on proceedings concerning the application of compulsory medical treatment measures to a person who committed a criminal offence being insane. The Court stated that it is necessary to consider a person's actual ability to exercise procedural actions. And the absence, in procedural law, of regulation differentiating the rights of those who, despite the illness, have retained the ability to exercise these actions, and of those who, due to their mental state, cannot independently defend their rights, is not consistent with the international obligations of the Russian Federation and the laws of the Russian Federation on psychiatric care and does not ensure protection of the rights of the individual from unreasonable limitations. By depriving a person who is or might be subjected to compulsory medical treatment of the possibility to exercise his procedural rights independently when a mental disorder does not preclude it, the state restricts the rights guaranteed to everyone by Articles 45 (Section 2) and 46 (Section 1) of the Constitution of the Russian Federation contrary to constitutionally significant aims of its Article 55 (Section 3).

Recognizing the respective provisions of the Criminal Procedure Code of the Russian Federation as non-conforming to the Constitution of the Russian Federation, the Constitutional Court of the Russian Federation in its Judgment No. 13-II of 20 November 2007 indicated that civil procedure legislation regulating issues of incapacitation of a person and his involuntary

hospitalization to a psychiatric in-patient facility permits this person to personally take part in hearings (if his health condition permits that), to personally submit motions, and to appeal to court against actions and decisions of medical and other personnel providing him psychiatric care if these actions and decisions violate rights and freedoms.

2.3. Thus, the imperatives of the Constitution of the Russian Federation, interrelated with the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms, which under Articles 15 (Section 4) and 17 (Section 1) of the Constitution of the Russian Federation are an integral part of the Russian legal system and have priority over domestic laws, and the principles and requirements of international legal acts entail the need to establish a special level of guarantees for persons suffering from mental disorders and in respect of whom incapacitation proceedings are initiated. Under the Constitution of the Russian Federation and with regard to legal consequences of incapacitation, these special guarantees are necessary to preclude any discrimination on the ground of mental disorder (mental illness, mental retardation, mental deficiency), and to secure the existence of only those limitations of rights which are permissible for generally recognized purposes in these cases.

3. Specifying the provision of Article 60 of the Constitution of the Russian Federation concerning the exercise of civil rights, the Civil Code of the Russian Federation provides that a person's legal capacity is his capacity to acquire and exercise civil rights by his own actions, to create civil obligations for himself and perform them is acquired in full at the age of majority, i.e. at the age of 18 (Paragraph 1, Article 21). The Civil Procedure Code of the Russian Federation defines civil procedural capacity as a person's capacity to exercise procedural rights by his own actions, perform procedural duties and entrust his representative with engaging in judicial proceedings; civil procedural capacity is acquired in full at the age of 18 (Section 1, Article 37).

At the same time, under Article 29 of the Civil Code of the Russian Federation, a person who, due to a mental disorder, cannot understand or control his actions may be declared legally incapable by the court in a procedure prescribed by civil procedural legislation; such person is placed in the care of a guardian (Paragraph 1); a guardian shall conclude transactions on behalf of the incapacitated person (Paragraph 2). The rights and duties of guardians afforded to them to protect the rights and interests of incapable persons in order to compensate for the lack of legal capacity and to provide these persons with social care are defined by civil legislation (Articles 31, 32, 34–36, 39 and 40 of the Civil Code of the Russian Federation). Under Federal Law No. 48-Φ3 of 24 April 2008, "On Guardianship and Custody", guardians shall be legal representatives of persons under their guardianship and shall be entitled to act in order to protect

the rights and lawful interests of these persons in any relations without a special authorization (Articles 2 and 15).

Thus, a judicial procedure for declaring a person incapable is necessitated by a significant change (in case of the respective decision by the court) in the legal status of a person who is deprived for an uncertain period of time of the possibility to exercise his rights and duties independently (by his own actions). The purpose of a judicial procedure is to prevent wrongful assessment of the person's ability to understand his actions and to control them, particularly if the proceedings are initiated by persons who expect to become the guardians. Within the meaning of Article 46 of the Constitution of the Russian Federation taken in conjunction with its Articles 55 (Section 3) and 60, the mere fact of a request to declare a person incapable shall not predetermine the court's decision and therefore may not be the basis for depriving the person of his civil procedural capacity, i.e. the possibility to exercise in full (by his own actions) his procedural rights, procedural duties and to authorize a representative to engage in proceedings on his behalf.

3.1. As follows from Article 34 and Section 2, Article 263 of the Civil Procedure Code of the Russian Federation, a person whose legal capacity is assessed by a court, being an interested party, has the status of a person participating in the case, and under Article 35 of the said Code has the right to consult the materials of the case, take excerpts from them, make copies, request recusals, submit evidence and take part in its examination, put questions to other persons participating in the case, witnesses, experts and specialists, submit motions including requests to obtain evidence, give oral and written explanations to the court, provide his arguments on all matters raised during proceedings, object against motions and arguments of other persons participating in the case, appeal against court judgments and use other procedural rights provided by the legislation on civil proceedings.

Pursuant to Article 284 of the Civil Procedure Code of the Russian Federation, an incapacitation request shall be examined by the court in the presence of the person concerned, the applicant, the prosecutor, a representative of the guardianship authority; the person whose legal capacity is being examined by the court has to be summoned to the hearing if his state of health permits his attendance (Section 1), i.e. the possibility for the person concerned to participate in the hearing is not excluded.

However, the law does not specify the procedure and criteria to determine if the presence of this person in the hearing is possible (or impossible), if he is to be notified of the time and place of the hearing, if the court is to provide this person with a possibility to enjoy procedural rights in any other manner and on an equal basis with other persons participating in the case, e.g. by appointing a defence counsel in order to ensure that qualified legal assistance is provided.

Such uncertainty allows for ambiguous interpretations and, therefore, arbitrary application of the provision of Section 1, Article 284 of the Civil Procedure Code of the Russian Federation as an integral part of the procedural arrangements regulating incapacitation proceedings, which take the form of special judicial proceedings. Therefore, the general legal principle of formal equality provided by Article 19 (Sections 1 and 2) of the Constitution of the Russian Federation is violated.

3.2. Pursuant to Article 283 of the Civil Procedure Code of the Russian Federation, during preparation for court consideration of an incapacitation case, the judge shall commission a forensic psychiatric examination to assess the person's mental state provided there is sufficient information about the mental disorder of the person concerned. In judicial practice (including the cases of the applicants in the present case), the conclusion of the forensic psychiatric examination that a person due to his illness cannot understand and control his actions and is unable to attend a hearing is considered a sufficient ground for not summoning him to the court hearing.

As a result, the person is essentially deprived of the rights which the Civil Procedure Code of the Russian Federation guarantees to persons participating in a case, including the right to take part in proceedings personally or through representatives of his own choosing (Section 1, Article 48), to provide explanations on the case (Article 68), to request personally or through a representative expert examination at a specific forensic expert institution or by a specific expert, to request recusal of an expert, to put questions for an expert, to consult the court's ruling commissioning an expert examination and the questions formulated in the ruling, to consult an expert's conclusion, to submit a motion for the court to commission repeated examination, additional examination, comprehensive examination or examination by a group of experts (Section 2, Article 79).

Consequently, the person whose legal capacity is being examined is not equal to the other participants in the proceeding in terms of procedural possibilities for defending his case and protecting his interests in consideration of the case, which is a violation of the principles of fair trial, adversarial proceedings, and equality of the parties and, consequently, violation of Articles 15 (Section 4), 17 (Section 1), 46 and 123 (Section 3) of the Constitution of the Russian Federation and Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

3.3. Incapacitation cases are qualified by the legislator as special order proceedings (Chapter 31 of the Civil Procedure Code of the Russian Federation). Although due to the special nature of these cases there are no parties in their usual procedural sense, the interests of the participants in the proceedings may nevertheless differ and, thus, shall be protected under the

universal principle of adversarial proceedings and equality of the parties (Article 123, Section 3 of the Constitution of the Russian Federation).

Deprivation of a person of the possibility to defend his position in person or through representatives of his own choosing prevents sufficiently full ascertainment of the circumstances of the case, consideration of explanations of all the interested persons, collection of other necessary evidence. As follows from the requirements of Article 55 (Section 3) of the Constitution of the Russian Federation with respect to the possibility of restriction of the rights of man and citizen, including the rights to liberty, inviolability of private life, independent and full exercise of a person's rights and duties (Section 1, Article 22; Section 1, Article 23; Article 60 of the Constitution of the Russian Federation), this measure may only be applied if it is necessitated by the nature of the mental disorder, its type and degree, i.e. meet the criteria of necessity and proportionality to the aim pursued and ensure fair procedures securing human dignity and respect for the person's interests.

Besides, as follows from Article 67 of the Civil Procedure Code of the Russian Federation, an expert's opinion does not have a predetermined weight for a judge and it shall be examined along with other evidence, including explanations by the person concerned. The evaluation must be based on the judge's inner conviction that there are no grounds to doubt accuracy, authenticity, professional quality and completeness of the experts' opinion on the nature and gravity of the disorder; possible consequences of the disorder for the social life, health, economic interests of the person; the kind of actions this person is not able to understand and control, etc. In case of doubt as to the accuracy and completeness of the expert conclusions, a judge must commission a repeated expert examination of the person's mental state.

Therefore, the presence of the person concerned at the hearing is necessary not only to enable him as an interested party to present his case, but also for the judge to be able to form his own opinion of the person's mental state and satisfy himself that the person concerned cannot understand and control his actions. Under such circumstances, in order to secure full and effective judicial protection, to avoid arbitrary interference in the right to liberty and inviolability of private life and to comply with the requirements of fairness, reasonableness and proportionality in deciding on the person's legal capacity, the judge must not confine himself only to written expert reports. Otherwise, the right to a fair trial is violated, and there is a definite risk of declaring a person incapable in a manner disproportionate to the constitutionally recognized aims of Article 55 (Section 3) of the Constitution of the Russian Federation.

3.4. Consideration of a case in the absence of the person concerned (against his wish) is only permissible under special circumstances, e.g. where there are sufficient grounds to believe that his presence is a real danger to others or that his health condition does not permit him to

appear before the court. However, since the change in the legal status of the person is so significant, it is preferable for the court to directly acquaint itself with the person's condition in order to verify the actual ability of the person to attend the hearing and to prevent unreasonable deprivation of a capable person status.

Excluding a person from participation personally or through a representative of his own choosing in the court hearing on a request to declare him incapable (e.g. by failing to notify him of the time and place of the hearing) is an impermissible restriction of not only the right to qualified legal assistance but also of the right to full and effective judicial protection based on the principles of equality before the law and the court, fair trial, adversarial proceedings and equality of the parties. These rights are guaranteed by Articles 19 (Section 1), 45 (Section 2), 46 (Section 1), 55 (Section 3) and 123 (Section 3) of the Constitution of the Russian Federation so as to preclude unlawful restriction of a person's right to exercise fully and independently his rights and duties (Article 60 of the Constitution of the Russian Federation).

In its Judgment of 27 March 2008 in the case *Shtukaturov v. Russia*, the European Court of Human Rights relying on its case law under Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (particularly, in its Judgment of 24 October 1979 in the case *Winterwerp v. the Netherlands*), recognized that in cases involving a mentally ill person the domestic courts enjoy a certain margin of appreciation, for example, they can make procedural arrangements in order to secure good administration of justice, protection of the health of the person concerned, etc., which, however, should not affect the very essence of the applicant's right to a fair trial. The European Court of Human Rights concluded that the decision of the judge to examine the case on the basis of documentary evidence, without the applicant's presence and without hearing his arguments, was unreasonable and held that the said proceeding was in breach of the principle of adversarial proceedings and thus in violation of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

3.5. Thus, the provision of Section 1, Article 284 of the Civil Procedure Code of the Russian Federation establishing that the person whose legal capacity is being examined by the court is to be summoned to the court hearing if his health condition permits his attendance, to the extent that this provision in the meaning attributed to it in the judicial practice allows courts to decide on a person's legal capacity on the basis of the conclusion of a forensic psychiatric expert examination alone, without giving the person a possibility to present his position to the court in person or through representatives of his own choosing, provided that his presence in the court is not dangerous to his life or health or to the life or health of others, does not conform to the Constitution of the Russian Federation, its Articles 19 (Sections 1 and 2), 45 (Section 2), 46 (Section 1), 55 (Section 3), 60 and 123 (Section 3).

4. Pursuant to the legal opinions of the Constitutional Court of the Russian Federation revealing the constitutional contents of the right to judicial protection, within the framework of judicial protection of rights and freedoms it is possible to appeal to a court against any decisions and actions (inactions) of any state bodies, *inter alia* courts. The lack of possibility to review a wrongful judicial act is incompatible with the universal requirement of effective restoration of rights in a fair trial. It derogates from and limits this right. Although the federal legislator enjoys fairly broad discretion in establishing a system of court instances, the sequence and procedure for appeals, the grounds for annulment or amending court decisions by superior courts, the powers of courts of superior instances, the legislator exercising respective regulation must give due regard to constitutional aims and values, generally recognized principles and norms of international law and international obligations of the Russian Federation and ensure procedural guarantees for persons participating in the case (Judgments No. 4-II of 2 February 1996, No. 5-II of 3 February 1998, etc.).

4.1. Pursuant to Articles 336 and 337 of the Civil Procedure Code of the Russian Federation, the first instance court's decisions which have entered into force (except for decisions of Justices of the Peace) may be appealed on cassation. The parties and other persons participating in a case may lodge a cassation appeal, and the prosecutor participating in the case may lodge a cassation request.

Therefore, a person who was declared incapable by a court decision has the right, as a person participating in the case (Articles 34 and 35 of the Civil Procedure Code of the Russian Federation), to appeal against this decision to a cassation instance court. However, if a court of first instance deviating from the requirements of the Constitution of the Russian Federation fails to take appropriate measures to verify the actual ability of the person concerned to participate in the hearing in person and considers it possible to consider his case in his absence and relying on a medical report alone does not notify the person of the time and place of the hearing, then the person can only learn about the court's decision to declare him incapable already upon expiration of the time limit for a cassation appeal, i.e. when the decision has entered into legal force and is enforced, which *inter alia* involves the appointment of guardians.

As a result, the person who did not participate for these reasons in the hearing in person or through representatives of his own choosing cannot exercise the right to a cassation appeal against the court decision either. Pursuant to the interrelated provisions of Section 5, Article 37, Section 1, Article 52, Subsection 3, Section 1, Article 135, and Section 1, Article 284 of the Civil Procedure Code of the Russian Federation within the meaning attributed to them in the judicial practice, he, as a person declared incapable, is already deprived of the right to independently exercise procedural actions, including appeals to a cassation instance court.

The relevant judicial practice interprets in a similar way the provision of Subsection 2, Section 1, Article 379¹ of the Civil Procedure Code of the Russian Federation, which establishes that a supervisory complaint brought by a person who does not have the right to appeal to a supervisory instance court shall be returned to him by the judge without consideration of its merits. This provision, interrelated with Section 5, Article 37, Section 1, Article 52, Subsection 3, Section 1, Article 135, and Section 1, Article 284 of the Civil Procedure Code of the Russian Federation, is a ground for denial to an incapacitated person of an appeal against a decision that has entered into force.

Further, a person who missed the time limit for a cassation appeal due to not being notified either of the court hearing on his incapacitation or of its outcome, is deprived of the possibility to seek supervisory review of the court decision declaring him incapable, because under Section 2, Article 376 of the Civil Procedure Code of the Russian Federation (as amended by Federal Law No. 330-Φ3 of 4 December 2007), judicial decisions may be reviewed by a supervisory instance court if other appeal remedies provided by the Code have been exhausted.

4.2. Thus, persons declared incapable in their absence (in the absence of their representatives), not being notified of the time and place of the consideration of the respective request, and who, for this reason, miss the time limit for lodging a cassation appeal, are totally deprived of procedural possibilities to appeal against the court decision and therefore of procedural guarantees for protection from unreasonable restriction of the constitutional right to exercise fully and independently their rights and duties from the age of 18. At the same time, given the consequences of incapacitation of a person, who in these cases is essentially deprived of this constitutional right, these persons must be guaranteed full and effective judicial protection.

Consequently, a person against whom this procedure is instituted and an incapacitation decision is rendered by a court must be provided both with qualified legal assistance provided to him by representatives of his own choosing (Section 1, Article 48 of the Constitution of the Russian Federation) and the possibility, under Articles 46, 56 (Section 3), 118, 125 and 126 of the Constitution of the Russian Federation, to have recourse to all the available domestic judicial remedies against violation of rights by unreasonable incapacitation (appeals to instances prescribed by law within the system of courts of general jurisdiction, including courts exercising review of decisions which have entered into legal force).

This right is enjoyed by persons participating in a case who submit requests to declare a person concerned incapable, and thus such right shall be enjoyed by a person declared incapable (due to the constitutional principle of equality before the law and the court and considering the general constitutional guarantees for the right to judicial protection). As a party to a case, this

person must be afforded this right until all the procedures for appealing court decisions prescribed by law have been exhausted, including supervisory review, let alone situations where a first instance court considered the request and declared the person incapable in the absence of the person or his representatives. Lack of possibility to appeal against a wrongful judicial decision is a violation of the right to judicial protection, which is essentially incompatible with the prohibition of its restriction (Section 3, Article 56 of the Constitution of the Russian Federation).

5. Under Articles 22 and 46 (Section 1) of the Constitution of the Russian Federation, restriction of liberty shall be allowed only under a judicial decision; prior to a court decision a person may be detained for a period of no more than 48 hours; everyone shall be guaranteed judicial protection of his rights and freedoms.

These constitutional provisions are interrelated with Articles 5, 6 and 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, and *inter alia* serve as a guarantee against unreasonable involuntary hospitalization of a person in a psychiatric in-patient facility.

5.1. The Constitutional Court of the Russian Federation, examining in its Judgments No. 4-II of 3 May 1995, No. 14-II of 13 June 1996 and No. 6-II of 14 March 2002 issues of constitutional guarantees for judicial protection of the rights and freedoms of man and citizen, including those related to arrest, detention and other forms of restriction of liberty of a person, expressed the following legal opinions.

The right to liberty and security of person proclaimed in Article 22 (Section 1) of the Constitution of the Russian Federation implies that a person may not be deprived of liberty and remanded in custody by arbitrary actions of the authorities; any danger of restriction of liberty and security of person, including situations where there are lawful grounds for such restriction, should be counterbalanced by the right to appeal to court.

The constitutional right to liberty and security of the person includes the right not to be subjected to restrictions involving such coercive measures as detention, arrest, remand in custody or deprivation of liberty in any other form, in the absence of grounds prescribed by law, an authorization by a court or competent officials, and beyond the established or controlled periods.

In situations involving restriction of the right to liberty and security of person, the guarantees of judicial protection are of special significance, which is also recognized by international legal instruments. Under these international legal acts every person arrested or detained on criminal charges is to be secured the right to a trial within reasonable time or the right to a release (Article 9 § 3 of the International Covenant on Civil and Political Rights, Article 5 § 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms).

Thus, restriction of liberty and security of persons during a considerable period time outside of judicial control is not permitted.

5.2. The Law of the Russian Federation “On Psychiatric Care and Guarantees of Citizens’ Rights in its Course” provides for a special procedure of placement in a psychiatric in-patient facility for persons declared incapable within a procedure prescribed by law. This person is placed in a psychiatric in-patient facility at the request or with the consent of his legal representative (Section 4, Article 28), where he must be examined within 48 hours by a commission consisting of psychiatrists from a psychiatric institution. This commission has to decide on the reasonableness of hospitalization; when hospitalization has been decided to be unreasonable and the hospitalized person does not wish to stay in the psychiatric in-patient facility, he must be immediately discharged (Section 1, Article 31, Section 1, Article 32).

Involuntary hospitalization to a psychiatric in-patient facility of a person suffering from a mental disorder, including a person declared incapable within an established procedure, is beyond any doubt a restriction of liberty, which, under the mentioned constitutional and international legal provisions and the legal opinions of the Constitutional Court of the Russian Federation, is only permissible under a judicial decision.

Meanwhile, Section 4, Article 28 of the Law of the Russian Federation “On Psychiatric Care and Guarantees of Citizens’ Rights in its Course”, as is demonstrated by the judicial practice, permits involuntary hospitalization of persons declared incapable in a psychiatric in-patient facility without a judicial decision based on the review of the reasonableness and necessity of such hospitalization and solely at the request or consent of their legal representatives. Under Articles 19 (Sections 1 and 2), 22, 23 (Section 1), 46 (Section 1 and 2) and 55 (Section 3) of the Constitution of the Russian Federation, such procedure may result in disproportionate restriction of the rights of these persons, including the rights to liberty and security of the person, inviolability of private life, and the right to judicial protection.

Concluding from the above and pursuant to Sections 1 and 2, Article 68, Article 71, Articles 72, 75, 79 and 100 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation”, the Constitutional Court of the Russian Federation

h e l d :

1. To recognize the provision of Section 1, Article 284 of the Civil Procedure Code of the Russian Federation, establishing that the person whose legal capacity is being examined by the court is to be summoned to the court hearing if his health condition permits his attendance, as non-conforming to the Constitution of the Russian Federation, its Articles 19 (Sections 1 and 2), 45 (Section 2), 46 (Section 1), 55 (Section 3), 60 and 123 (Section 3). This provision is

unconstitutional to the extent that within the meaning attributed to it in the current judicial practice it permits the court to declare a person incapable only on the basis of a forensic psychiatric expert examination, without giving the person concerned the possibility to present his case to the court in person or through representatives of his own choosing, provided that his presence in the hearing creates no danger to his life or health or to the life or health of others.

2. To recognize the interrelated provisions of Section 5, Article 37, Section 1, Article 52, Subsection 3, Section 1, Article 135, Section 1, Article 284 and Subsection 2, Section 1, Article 379¹ of the Civil Procedure Code of the Russian Federation as non-conforming to the Constitution of the Russian Federation and its Articles 19 (Sections 1 and 2), 45 (Section 2), 46 (Section 1), 55 (Section 3), 60 and 123 (Section 3), to the extent that these provisions, within the meaning attributed to them by the current judicial practice and in the system of the existing legal regulation of the cassation and supervisory review proceedings, do not allow a person declared incapable by the court to appeal against the court decision on cassation and supervision where a first instance court failed to provide the person concerned with the possibility to present his case in person or through representatives of his own choosing, and given that his presence in the hearing was not considered dangerous to his life or health or to the life or health of others.

3. To recognize the provision of Section 4, Article 28 of the Law of the Russian Federation “On Psychiatric Care and Guarantees of Citizens’ Rights in its Course”, under which a person declared incapable within a procedure prescribed by law is to be placed in a psychiatric facility at the request or with the consent of his legal representative, as non-conforming to the Constitution of the Russian Federation and its Articles 19 (Sections 1 and 2), 22 (Section 1), 46 (Sections 1 and 2) and 55 (Section 3), to the extent that this provision implies placement of an incapable person in a psychiatric facility without a court decision reviewing the reasonableness of the involuntary hospitalization.

4. The cases of Yu. K. Gudkova, P. V. Shtukurov and M. A. Yashina are to be reconsidered by courts according to the established procedure in consideration of this Judgment.

5. To discontinue the proceedings in the present case to the extent concerning the review of the constitutionality of Paragraph 3, Article 222, and Section 2, Article 286 of the Civil Procedure Code of the Russian Federation.

6. This Judgment shall be final and shall not be subject to any appeal, it shall come into force immediately upon pronouncement and shall be directly applicable.

7. Pursuant to Article 78 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation”, this Judgment shall be published in the Collection of Laws of the Russian Federation and *Rossiyskaya Gazeta*. The Judgment shall also be published in the Bulletin of the Constitutional Court of the Russian Federation.

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